SUPERIOR COURT
OF THE
STATE OF DELAWARE

M. JANE BRADY

NEW CASTLE COUNTY COURTHOUSE
WILMINGTON, DE 19801-3733

BY LEXIS NEXIS FILE & SERVE

August 25, 2006

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RE: Valerie L. Spady v. Robin Keen, CA No. 04C-11-185 MJB

Date Submitted: July 10, 2006
Date Decided: August 25, 2006

Upon Plaintiff's Motion to Amend Complaint
DENIED.

Counsel:

The Plaintiff, Valerie Spady, brought an action for injuries received in a vehicle collision on December 23, 2002. The action was filed on November 17, 2004. The matter proceeded to Arbitration in July 2005, and a

decision awarding the amount of $15,000.00 to the Plaintiff was entered on July 2. 2005. A request for review *de novo* was filed, and trial was set by Order dated August 19, 2005 for July 24, 2006.

In September 2005, the Plaintiff filed a Motion to Amend the Complaint to add her son, Aaron, who had been riding in the vehicle with her at the time of the accident, as a Plaintiff. The motion was opposed on the basis that the Statute of Limitations precluded the actions. At the hearing on the Motion in October 2005, this Court, Judge Slights, stated, ""I don't see that 15(c) is implicated under these facts. The saving statute in Title 10 doesn't apply here, either, under the circumstances." A review of the transcript of the October hearing does indicate that the Court would permit Plaintiff to renew the motion to raise the issue whether the action could survive under 18 Del. C. §3914.

The docket reflects no further action by Plaintiff until the pre-trial conference on June 27, 2006. At that time, Plaintiff's counsel informed the Court that the Plaintiff had agreed to settle the case at mediation, but that a decision on the Motion to Amend the Complaint to include the Plaintiff's son as a party was still outstanding. Defense counsel's response at the pre-trail conference was that the son's action was barred by the statute of limitations. Both counsel agreed that a decision on that legal issue was

dispositive, and would resolve the case. The Court, therefore, continued the trial date and allowed submission on the issue. That issue as stated was "[w]hether Plaintiff Aaron Spady has a valid claim or whether it is barred by the statue of limitations. Plaintiff contends that his claim is viable since Defendant did not provide him with notice of the applicable statue of limitations in violation of 18 Del. C. § 3914."[1]

Plaintiff has now abandoned the legal claim that the insurer failed to give proper notice of the applicable statue of limitations, identified at the pre-trial as dispositive.[2] Plaintiff acknowledges that the time for filing a new claim has passed, but now contends the Amendment should be allowed pursuant to Superior Court Civil Rule 15, and should related back to the date the original action was filed, within the statute of limitations. The Defendant contends that this is a new claim, and a new action, and cannot relate back. The defense contends Rule 15 requirements are not met and that the case law does not support Plaintiff's argument.

Applicable Law

[1] Plaintiff's portion of the pre-trial stipulation.
[2] *See* Plaintiff's submission dated June 29, 2006.

Generally, the Courts will liberally construe provisions to allow for the amendment of pleadings, and leave shall be feely given when justice so requires.[3]

Superior Court Civil Rule 15 (c), which provides for the relation back of amendments, states:

(c) *Relation back of amendments.* An amendment of a pleading relates back to the date of the original pleading when

> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by statute or these Rules for service of summons and complaint, the party to be brought in by amendments (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have know that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Analysis

[3] Rule 15(a); *Mullen v. Alarmguard of Delmarva, Inc*., 625 A.2d 258, 263 (Del. 1993).

The Court believes the short answer to the question presented is that it has already been decided by Judge Slights, in October 2005. In the event there is any confusion about that, this Court will examine the issue as well.

First, the Court finds that the proposed amendment adds not only a new party, but a new claim.[4] It is therefore, precluded by Rule 15. In this case, claims relating to the nature and extent of injuries to the son, their impact on his lifestyle, any pain and suffering, any permanency, and prior or pre-existing injuries all will be specific to him and must be defended against specifically. None of those issues were at issue in the original action, and no facts have been cited to explain why the son was not named in the original action.

Second, the amendment is not permitted under Rule 15(a). Responsive pleadings have been filed, the case was placed on the trial calendar, and has even been settled by the parties.[5] At this point, written consent of the adverse party or leave of the Court is required to amend the complaint. The defendant clearly opposes the amendment and the Court is not inclined to exercise the power to grant the leave to amend.

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[4] Plaintiff's reliance on *Thompson v. Dupont De Nemours, et al*, 1991 WL 166122 (Del.Super.), a case involving a loss of consortium claim, is misplaced. The very nature of a loss of consortium claim is derivative from the injuries suffered by the spouse. Litigation regarding the spouse's injuries in the amended action will be no different than litigation of the spouse's injuries in the original action. Any claim of consortium is dependant upon proof of the underlying claim.

[5] The Court leaves for another day whether in a case such as this, the amendment would be permitted when counsel has represented to the Court hat the original claim to which the party seeks amendment is settled, but the final paperwork has no been submitted to the Court to dismiss the case from the docket.

Plaintiff's counsel claims that State Farm was aware of the son's involvement in the accident, and the possibility he might have a claim, and therefore cannot claim prejudice or surprise. Certainly, the plaintiff also knew of her son's involvement, and further, knew how her son's health was progressing or if he had any injuries which would justify filing an action on his behalf. In addition, under Rule 15(c), the defense would need to be on notice of the lawsuit by Aaron Spady, not just the incident that could give rise to the lawsuit.[6]

Both parties cite to the notice provisions of rule 15(c) as supporting their contentions. The Court finds there was not sufficient notice to comply with Rule 15(c) and that there was no mistake of identification of the parties, and therefore, 15(c) does not allow the amendment.

Lastly, the Court has not been provided with any convincing evidence that justice requires leave to amend the complaint be granted here. The Court notes the timing of the request to amend the complaint. This action was initially filed in November 2004, twenty-three (23) months following the collision. The motion to amend was first filed on September 30, 2005, ten (10) months after the action was filed and following all pleadings, a Rule 16 Arbitration hearing and issuance of a Trial Scheduling Order. Following

[6] *Merganthaler, Inc. v. Jefferson*, 332 A.2d 396, 397-398 (Del. 1975).

the hearing before Judge Slights in October 2005, at which plaintiff was advised she would be allowed to renew the motion, no action was taken by plaintiff until the pre-trial conference on June 27, 2006, three and a half years following the collision. The Court, assured that the dispositive legal issue would resolve the case, continued the trial date and allowed submissions. In those, the plaintiff abandoned the legal theory purported to be dispositive at the pre-trial, and asked the Court to decide the motion on a different theory.

The effect an amendment to the pleadings will have on the trial date is a consideration the Court should weigh when deciding whether to exercise the discretion to grant an amendment.[7] The requested amendment has caused the trial date to be continued. This is another factor that weighs against granting the amendment.

Conclusion

It is clear that the decision is within the sound discretion on the Court whether to permit the amendment.[8] The Court declines to allow the amendment. The proposed amendment adds a new claim, requiring the defense to defend an entirely different case on every element except liability.

[7] *Walley v. Harris*, 1997 WL 817867 (Del.Super) (considering the trial date in deciding how to exercise discretion in a similar situation).
[8] *Mullen v. Alarmguard*, 625 A.2d at 264; *Lavin v. Silver*, 2003 WL 21481006, *2 (Del.Super.); See also Rule 15(a) for specific, statutory amendment provisions.

The amendment was not prosecuted vigorously or timely, and there has been no evidence that any compelling interests of justice would be served by permitting the amendment.

For the foregoing reasons, the amendment will not be allowed.

IT IS SO ORDERED.

/s/
The Honorable M. Jane Brady